(i) The number of inspection points or miles of track requiring coverage;

(ii) Traffic levels of railroads operating in the state;

(iii) Accident history and accident potential of railroads in the state;

(iv) Any undertakings by the state agency to provide investigative and surveillance activities under the laws set forth at section 212.3(c)(2)–(5) of this part;

(v) The deployment of FRA personnel; and

(vi) Other relevant factors, including available obligational authority.

(2) The minimum level of effort authorized for funding for a state agency providing all planned compliance inspections under the Federal Railroad Safety Act by agreement is not less than that set forth in Appendices A and B to this part.

(b) *Certification.* The maximum level of inspection effort for which reimbursement may be authorized with respect to a state agency participating by certification is set forth in Appendices A and B to this part.

(c) *Allocation.* The FRA reserves the right to allocate available obligational authority among participating states in the event insufficient funds are appropriated to provide the full 50 percent Federal contribution authorized by the Federal Railroad Safety Act of 1970.

(d) *Additional participation.* A state agency participating by agreement or certification may elect to provide increments of inspection effort beyond the level established for purposes of maximum funding under this subpart. However, all investigative and surveillance activities conducted by a participating state agency must be carried out through personnel qualified under Subpart C of this part.

Appendix A.—Track Inspection

As provided in this part, the minimum level of investigative and surveillance effort for a state agency participating by certification and the maximum reimbursement level for the Federal share of such activities with respect to the Track Safety Standards are specified for each state and are expressed in terms of man-years of effort.

State	Minimum inspection effort	Maximum reimbursement level
Alabama	1.66	2
Arizona	.88	1
Arkansas	1.10	2
California	3.38	4
Colorado	1.2	2
Connecticut	.21	1
Delaware	.1	1
Florida	1.41	2
Georgia	1.96	2
Idaho	.93	1
Illinois	5.30	6
Indiana	2.63	3
Iowa	2.54	3
Kansas	2.79	3
Kentucky	1.53	2
Louisiana	1.43	2
Maine	.58	1
Maryland	.47	1
Massachusetts	.48	1
Michigan	2.40	3
Minnesota	2.40	3
Mississippi	1.18	2
Missouri	2.36	3
Montana	1.59	2
Nebraska	1.80	2
Nevada	.50	1
New Hampshire	.23	1
New Jersey	.76	1
New Mexico	.80	1
New York	2.15	3
North Carolina	2.32	3
North Dakota	1.64	2
Ohio	3.34	4
Oklahoma	1.65	2
Oregon	1.07	2
Pennsylvania	3.94	4
Rhode Island	.05	1
South Carolina	1.03	2
South Dakota	.99	1
Tennessee	1.24	2
Texas	4.94	5
Utah	.59	1
Vermont	.24	1
Virginia	1.52	2
Washington	1.92	2
West Virginia	1.54	2
Wisconsin	1.85	2
Wyoming	.70	1

Appendix B.—Freight Car Inspection

As provided in this part, the minimum level of investigative and surveillance effort for a state agency participating by certification and the maximum reimbursement level for the Federal share of such activities with respect to the Freight Car Safety Standards are specified for each state and expressed in terms of man-years of effort:

State	Minimum inspection effort	Maximum reimbursement level
Alabama	1.24	2
Arizona	.28	1
Arkansas	.50	1
California	1.76	2
Colorado	.51	1
Connecticut	.20	1
Delaware	.14	1
Florida	1.82	2
Georgia	1.19	2
Idaho	.41	1
Illinois	3.49	4
Indiana	1.77	2
Iowa	1.82	2
Kansas	.74	1
Kentucky	1.35	2
Louisiana	1.02	2
Maine	.33	1
Maryland	.54	1
Massachusetts	.40	1
Michigan	1.54	2
Minnesota	1.66	2
Mississippi	.47	1
Missouri	.99	1
Montana	.67	1
Nebraska	.54	1
Nevada	.13	1
New Hampshire	.07	1
New Jersey	.77	1
New Mexico	.18	1
New York	1.86	2
North Carolina	.79	1
North Dakota	.23	1
Ohio	4.67	5
Oklahoma	.49	1
Oregon	.66	1
Pennsylvania	3.47	4
Rhode Island	.04	1
South Carolina	.44	1
South Dakota	.15	1
Tennessee	.82	1
Texas	2.94	3
Utah	.85	1
Vermont	.10	1
Virginia	1.66	2
Washington	1.90	2
West Virginia	1.40	2
Wisconsin	1.16	2
Wyoming	.40	1

[FR Doc. 81-18880 Filed 6-24-81; 8:45 am]

BILLING CODE 4910-06-M

49 CFR Part 213

[Docket No. RST-3, Notice No. 2]

Track Safety Standards; Miscellaneous Proposed Revisions

AGENCY: Federal Railroad Administration (FRA); DOT.

ACTION: Withdrawal of proposed rule.

SUMMARY: On September 6, 1979, FRA published a notice of proposed rulemaking (NPRM) (44 FR 52104) proposing to amend the Track Safety Standards (49 CFR 213). This notice announces the withdrawal of that notice. The substantial discrepancies between the figures for rehabilitation costs and the widely differing assessment of the commenters concerning the necessity and impact of the proposed amendments have caused the FRA to conclude that it is not practicable to develop an appropriate final rule on the basis of this NPRM.

FOR FURTHER INFORMATION CONTACT:

Principal Program Person: Rolf Mowatt-Larssen, Office of Standards and Procedures, Room 7315, Federal Railroad Administration, 400 Seventh Street SW., Washington, D.C. 20590, phone (202–426–0924).

Principal Attorney: Edward F. Conway, Jr., Office of the Chief Counsel, Room 8211, Federal Railroad Administration, 400 Seventh Street SW., Washington, D.C. 20590, phone (202–426–8836).

SUPPLEMENTARY INFORMATION: FRA published a notice of proposed rule making (NPRM) on September 6, 1979, proposing to amend the track safety standards (44 FR 52104). Following the publication of the NPRM, FRA conducted public hearings on December

10 and 11, 1979, to provide an opportunity for interested persons and organizations to testify concerning the proposed amendments. At that hearing, testimony was presented by 5 railroads, the Association of American Railroads (AAR), The Railway Labor Executives Association (RLEA), 1 corporation, 3 state agencies, the Southeastern Pennsylvania Transportation Authority, the National Industrial Traffic League, and 1 Congressman. In addition, written comments were submitted by 6 railroads, 20 private corporations, 15 state agencies, 4 transportation organizations, 4 professional consultants, 7 railroad passenger associations, and 17 private parties.

Many of the comments indicated that the impact of implementing these proposed rules would be much greater than originally indicated by the FRA analysis.

The FRA staff analysis indicated that only four of the amended sections (§§ 213.9, 213.57, 213.109 and 213.237) would have a noticeable economic impact on the rail industry. FRA anticipated a total one-time track rehabiliation cost of $20.2 million and a total increase of $3.5 million in annual operating costs. On the other hand, AAR contended that these four and many of the other proposed track standards are economically infeasible and would cost $858.7 million in rehabilitation costs and $63.8 million in additional operating expenses.

The FRA believes that much of the difference between the FRA and AAR figures is due to the AAR's assumption that the implementation of proposed section 213.9 would require the railroads to upgrade most of their existing track. Based on this assumption, the AAR has estimated the total upgrade cost at $720 million and the annual maintenance cost at $14.4 million, whereas the FRA analysis estimated the cost to upgrade the track at $3.1 million.

Specifically, the AAR contends that the proposed changes in § 213.9 would require all track to be upgraded in order to maintain the present operating speed. However, a significant portion of the track in an FRA sampling already complied with higher class requirements and consequently would not require a massive rehabilitation expense.

The substantial discrepancies between these figures and the widely differing assessment of the commenters concerning the necessity and impact of the proposed amendments have caused the FRA to conclude that it is not practicable to develop an appropriate final rule on the basis of this NPRM. Accordingly, FRA is withdrawing the NPRM. However, FRA will continue to review the current Track Safety Standards with the goal of developing another NPRM. This review will be conducted in accordance with the requirements of Executive Order 12291 issued on February 17, 1981 (46 FR 1391). This notice is issued under the authority of sections 202 and 208 of the Federal Railroad Safety Act of 1970, as amended, 45 U.S.C. 431 and 437; Regulations of the Office of the Secretary of Transportation (49 CFR 1.49(n)).

Issued in Washington, D.C., on June 16, 1981.

Robert W. Blanchette,

Administrator.

[FR Doc. 81-18581 Filed 6-24-81; 8:45 am]

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National Highway Traffic Safety Administration

49 CFR Part 571

[Semi-Annual Regulations Agenda; Docket 80-11, Notice No. 2]

Federal Motor Vehicle Safety Standards; Lamps, Reflective Devices, and Associated Equipment

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Termination of rulemaking.

SUMMARY: This notice announces termination of rulemaking with respect to amending the Federal motor vehicle lighting standard to require illumination of motorcycle headlamps and taillamps when the engine is running, and to have special tests for waterproof boat trailer lamps (Docket 80-11).

FOR FURTHER INFORMATION CONTACT: W. Marx Elliott, Office of Rulemaking, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, D.C. 20590 (202-426-1714).

SUPPLEMENTARY INFORMATION: In its recent semi-annual Regulations Agenda (see e.g. 45 FR 56538, August 25, 1980) the agency has indicated that it would issue a Notice of Proposed Rulemaking, in implementation of a granted rulemaking petition, to amend Motor Vehicle Safety Standards No. 108 to require the taillamps and headlamps of motorcycles to be illuminated at all times when the engine is running. The safety purpose of the amendment would be to improve conspicuity of motorcycles and their riders. Actuation of headlamps and taillamps has been an operational requirement in California for several years, and in some other jurisdictions as well. As a consequence, a NHTSA survey discovered that in 1979, 99.8 percent of all motorcycles manufactured for sale in the United States, other than motor driven cycles such as mopeds and motor scooters, were wired so that lamps were on when the ignition was on and the engine running. Further, the electrical charging systems on these vehicles appear to be adequate for the constant load imposed upon them. Thus, there appears to be no need for an amendment of this nature, and rulemaking with respect to it has been terminated.

On July 3, 1980, the agency issued a Notice of Request for Comments (45 FR 45334; Docket 80-11; Notice No. 1) regarding the need to amend Standard No. 108 to specify requirements and test procedures for boat trailer lamps. The notices specifically requested information regarding the safety need for regulation because the NHTSA had no accident statistics that would justify such a regulatory action. The notice elicted responses from five manufacturers, two trade associations, and the California Highway Patrol. Manufacturers of trailer lighting equipment emphasized that there were few complaints regarding the quality of lamps. Comments also indicated a lack of information showing whether boat trailers have a higher accident rate than other types of trailers. The agency has concluded, therefore, that there is no need for an amendment of this nature, and announces that rulemaking on this subject has been concluded.

(Secs. 103, 119, Pub. L. 89-563, 80 Stat. 718 (15 U.S.C. 1392, 1407); delegations of authority at 49 CFR 1.50 and 49 CFR 501.9)

Issued on June 16, 1981.

Michael M. Finkelstein,

Associate Administrator for Rulemaking.

[FR Doc. 81-18512 Filed 6-24-81; 8:45 am]

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Notices

Federal Register
Vol. 46, No. 122
Thursday, June 25, 1981

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Equal Access to Justice Act: Agency Implementation

AGENCY: Office of the Chairman, Administrative Conference of the United States.

ACTION: Issuance of model rules.

SUMMARY: The Chairman, Administrative Conference of the United States, issued model rules for the guidance of Federal agencies in implementing the Equal Access to Justice Act (Pub. L. 96-481, 94 Stat. 2325). The Act, which takes effect October 1, 1981, provides for the award of attorney fees and other expenses to parties who prevail over the Federal government in certain administrative and court proceedings. It requires agencies conducting covered adjudications to establish uniform procedures for making awards, after consultation with the Chairman of the Administrative Conference. These model rules are intended to provide guidance for agencies in developing their own regulations.

FOR FURTHER INFORMATION CONTACT: Stephen L. Babcock, Executive Director, or Mary Candace Fowler, Staff Attorney, Administrative Conference of the United States, 2120 L Street NW., Suite 500, Washington, D.C. 20037; (202) 254-7020.

SUPPLEMENTARY INFORMATION: On March 4, 1981, the Chairman of the Administrative Conference of the United States requested public comment on draft model regulations for Federal agency implementation of the Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325 (46 FR 15895, March 10, 1981). The Act authorizes the award of attorney fees and other expenses to certain parties who prevail against the United States in adversary adjudications (proceedings under section 554 of the Administrative Procedure Act, 5 U.S.C. 554, in which the position of the United States is represented by counsel or otherwise) conducted by Federal agencies and in civil court proceedings other than tort actions. Eligible prevailing parties are entitled to awards of fees and expenses, unless the presiding officer or judge finds that the position of the United States was substantially justified or that special circumstances make an award unjust. Eligible parties include individuals with a net worth of no more than $1 million; sole owners of unincorporated businesses, partnerships, corporations, associations or organizations with a net worth of no more than $5 million and no more than 500 employees; and tax-exempt charitable, educational or religious organizations and agricultural cooperative associations with no more than 500 employees, regardless of net worth. The Act becomes effective on October 1, 1981, and will apply to proceedings pending on that date.

The Act directs agencies to establish uniform procedures for the award of fees in their administrative proceedings, after consultation with the Chairman of the Administrative Conference. To facilitate this process, we developed the draft model regulations, with the help of a task force of volunteers from numerous Federal agencies. We are now issuing final model regulations, revised in response to the comments we have received.

At the outset, we would like to clarify the effect of the model regulations and the role of the Administrative Conference in the implementation of the Act. Some commenting agencies expressed uncertainty about whether the model rules developed by this office might be binding on them. The Chairman's statutory role is consultative; as we made clear in the draft rules, the Act does not empower the Chairman to compel other agencies to adopt specific procedures or interpretations. The primary purpose of the model rules is to promote uniformity of procedures. Ultimately, questions of the Act's meaning will be resolved by the courts, and we cannot predict how an agency's adoption of, or departure from, the model rules' interpretations and procedures will affect the amount of deference a court accords its actions.

The Act does, however, mandate the establishment of uniform procedures. While identical rules government-wide are a practical impossibility, we expect agencies, in pursuit of this statutory objective, to give serious consideration to the model rules, as well as to the views of this office on the rules proposed by particular agencies.

We received numerous comments on the draft model rules from government agencies and other interested individuals and organizations. A discussion of the model rules and the related comments follows, as well as a section of notes to help agencies use the model rules. In developing the final model rules, we have tried to produce a scheme that is as clear, simple, and straightforward as possible, in view of the remedial purpose of the Act and its focus on small businesses and individuals. In addition to the changes specifically discussed below, we have made extensive editorial changes to help achieve this purpose. The rules have also been reorganized, and the number of subparts reduced. Material in subparts B and F of the draft rules now appears in § 0.106 and § 0.107, respectively, in subpart A of the final rules. Subpart E of the draft rules is now § 0.310 in subpart C of the final rules.

Subpart A—General Provisions

This subpart contains general provisions explaining the Equal Access to Justice Act and its coverage. Section 0.101 summarizes the purpose of the model rules; the draft provision briefly described the Act without referring to the Act's provision that an award may be denied where special circumstances would make one unjust. Several commenters suggested adding a reference to this provision, and we have done so. The Department of Health and Human Services (HHS) proposed a revision to clarify that the purpose of the Act is to reimburse expenses incurred, not to punish agencies. We do not believe the requested change is necessary. The broader issue of whether awards should be based on reimbursement of actual costs is discussed in connection with § 0.106, below.

Section 0.102 provides that the Act applies to adversary adjudications pending at any time between October 1, 1981 and September 30, 1984. The United States Postal Service (USPS) noted that,

as a technical matter, many proceedings in which that agency enters into compromise agreements remain pending indefinitely. USPS said that proceedings already in this status on October 1, 1981 should not be covered by the Act. We believe this is a reasonable interpretation of the Act, assuming the proceedings are not reopened during the Act's effective dates. Since we suspect that this is not a common situation, however, we have not revised the model rules to cover it. We think a special provision in the rules adopted by USPS, and any other agency in a similar situation, will suffice.

Proceedings Covered

Section 0.103 of the rules describes the types of proceedings covered by the Act. Several commenters discussed the draft rules' provision that proceedings in which agencies voluntarily use the formal procedures of section 554 of the Administrative Procedure Act, 5 U.S.C. 554, would be covered by the Act. The Equal Access to Justice Act provides, in 5 U.S.C. 504(b)(1)(C), that covered adversary adjudications are those "under section 554 of this title in which the position of the United States is represented by counsel or otherwise." Section 554 of the Administrative Procedure Act applies, with some exceptions, to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." Exactly what proceedings are encompassed by this language has long been a difficult legal question, and we proposed a broad interpretation of the reference to adjudications "under section 554" largely to avoid protracted debate about whether particular proceedings fall within its ambit. In addition, we reasoned that, considering the purposes of the Equal Access to Justice Act, questions of its coverage should turn on substance—the fact that a party has endured the burden and expense of a formal hearing—rather than technicalities.

Commenters including Division I (Administrative Law and Agency Practice) of the District of Columbia Bar, the Department of Transportation (DOT), the American Metal Stamping Association, the National Screw Machine Products Association, and the National Oil Jobbers Council endorsed this approach, but several government agencies disagreed. Where the use of formal hearing procedures is truly voluntary, they argued, the model rules' approach will give agencies an incentive not to use them, possibly to the detriment of the private party's interests. Where there are questions about the applicability of section 554, according to the commenters, this approach will not avoid disputes, but will merely change them from litigation issues to internal agency controversies. These commenters also contended that our tentative interpretation of the phrase "under section 554" was impermissibly broad, since waivers of sovereign immunity are to be construed narrowly, and that the draft model rules' liberal construction would distort the plain meaning of the phrase.

Giving agencies an incentive to provide informal procedures whenever they have a choice may not always disadvantage the private party; this will depend on the facts of the particular case. We are concerned, however, that the liberal interpretation of the draft model rules may provide for broader applicability than Congress intended. In some statutory schemes, Congess has provided that private parties in disputes with the Federal government are entitled to hearings as of right; in others, for whatever reasons, it has determined that hearings may be provided at the discretion of the government. On reflection, we have concluded that it is more consistent with the purpose of the legislation not to cover proceedings of the latter type than to include them. Moreover, if Congress did intend to restrict awards to cases required to be conducted under the procedures of section 554, then agencies have no legal authority to award fees under the Act in any other class of cases. We have decided, therefore, to drop the provision of the draft rules suggesting that awards will be available when agencies voluntarily use the procedures described in section 554.

There remains, however, the difficult question of what proceedings are "under section 554." Where it is clear that certain categories of proceedings are governed by this section, agencies should list the types of proceedings in their rules. Where the question is not definitively resolved, we believe the agency should determine, to the extent possible, whether section 554 applies before bringing the proceeding. In such situations, the document initiating any proceeding the agency believes to be covered by the Act should so state, and the rules provide for this. In view of the Act's remedial purpose, an applicant should not have to shoulder the burden of demonstrating in each case that the proceeding is covered. Of course, if an applicant believes that a proceeding is covered and the litigating unit of the agency disagrees, the applicant will have to argue the question before the agency, subject to possible judicial review.

The Federal Energy Regulatory Commission (FERC) and the Department of Justice objected to the draft rules' provision that adversary adjudications to determine the reasonableness of past rates or terms of service are covered by the Act, although Division I of the D.C. Bar supported this provision. FERC pointed out that almost all cases involving new rates also involve existing or "past" rates, and suggested that only enforcement or complaint cases should be covered by the Act. We agree that the draft rules oversimplified this issue. As revised, the model rules provide that any proceeding in which an agency may prescribe a lawful future or present rate is excluded from the Act. HHS said the rules should clarify whether initial license denials are covered by the Act; we believe that these fall clearly within the exception for initial licensing proceedings in the rules, so no additional clarification is needed.

USPS suggested revising paragraph (c) of § 0.103, concerning proceedings involving both covered and excluded issues, to provide that only legal fees and espenses incurred solely for the adjudication of covered issues should be recoverable. However, we prefer the draft rules' approach. In those rare cases where fees related to covered issues relate also to excluded issues, we believe the adjudicative officer can make any necessary judgment as to whether to reduce or deny an award for those fees, after considering the individual circumstances.

the International Trade Commission described its hybrid unfair import trade practices proceedings, which open with a section 554 adjudication to determine whether the law has been violated. If a violation is found, the Commission then holds a non-adjudicative proceeding to consider related policy issues. The Commission said that the model rules should make clear that only the initial phase of such a proceeding would be covered by the Act. We don't think the model rules should cover this relatively unusual situation explicitly. Matters of this type, related to specific agencies' unique procedures, are better handled in individual agency rules.

Some agencies asked the Conference to determine whether proceedings conducted by agency boards of contract appeals are covered by the Act, and the Department of Education asked whether the proceedings of its Education Appeal Board are covered. There is some indication in the Act that proceedings of boards of contract appeals are not

included. Section 204 of the Act (28 U.S.C. 2412(d)(3)) provides that courts shall award fees in actions for judicial review of adversary adjudications as defined in 5 U.S.C. 504 *or* of adversary adjudications subject to the Contract Disputes Act of 1978, thus implying that Congress did not regard the latter category of cases to be "under" section 554 for this purpose. As a general matter, however, we believe individual agencies are far better equipped to determine whether their proceedings are under section 554 of the Administrative Procedure Act than we are, since this determination requires knowledge of the particular laws administered by each agency.

Eligibility

Section 0.104 identifies those eligible for awards under the Act. USPS and DOT found the language in the draft provision describing a "party" as "the person or entity identified in the order or notice initiating the proceeding" unclear; we believe the sentence is unnecessary and have dropped it.

Net Worth: First Southern Federal Savings and Loan Association of Mobile, Alabama, objected to the $5 million limit on net worth, since banks must maintain certain net worth ratios. We are not in a position, however, to change the limit, which is explicitly set by the statute. The National Screw Machine Products Association said that assets acquired or obligations incurred during a proceeding should be excluded from net worth. We agree, and both the statute and the model rules provide that eligibility shall be determined as of the date the proceeding begins. The Civil Aeronautics Board (CAB) suggested that the eligibility provisions of this subpart include cross-references to the net worth provisions fo subpart B, but we don't believe that the text of the model rules is long enough to require such cross-references.

The Treasury Department proposed that we clarify that the net worth of sole owners of unincorporated businesses must include both their personal and business assets, and we have done so. In response to a Justice Department suggestion, we have also revised § 0.104(d) to provide that an applicant's status as an individual or a sole owner of an unincorporated business shall be determined based on the personal or business nature of the issues on which the applicant prevails, rather than all the issues in the case.

Employees: The CAB and the Nuclear Regulatory Commission (NRC) believe the draft rules' definition of "employees" is too broad. NRC said the definition should include the concept of employer control, to avoid including independent contractors; similarly, the CAB said the draft definition might include travel agents as airline employees. The Federal Trade Commission (FTC), on the other hand, supports the draft definition, since it believes companies sometimes characterize workers who are really employees as "contractors." The Department of Energy (DOE) said the definition could properly exclude temporary and seasonal workers, but should be revised to include part-time workers explicitly.

While we agree that the definition in the draft model rules may be inadequate, the commenters generally did not offer specific alternatives, and we are concerned that a precise definition may be under-or over-inclusive. We have decided on a general definition that includes the concept of employer control, and we have provided for the inclusion of part-time employees on a proportional basis. Agencies that can anticipate dealing frequently with particular situations that may cause difficulty (*e.g.*, airline-travel agent relationships) should probably provide specific guidelines on these situations in their individual rules.

The American Metal Stamping Association and the National Screw Machine Products Association suggested that the number of employees of an applicant should be determined by looking at the average number of employees for the twelve month period before the start of the proceeding. While this is an interesting suggestion, we believe it goes beyond the statutory mandate that eligibility will be determined as of the date the proceeding in initiated.

Limits on Eligibility: The Department of Justice expressed concern about three provisions in the eligibility section of the draft rules: that providing for aggregation of the net worth of affiliated entities; that disregarding transactions solely for the purpose of meeting a net worth standard; and that disqualifying applicants because of their participation solely on behalf of others who are not eligible. Though it believes such provisions are desirable, the Department doubts whether the Act authorizes agencies to adopt such substantive standards by regulation. Instead, it proposes, factors like these could be considered on a case-by-case basis, as "special circumstances" that may make an award unjust.

We don't agree that agencies lack authority under the Act to adopt regulations such as these. The Act states that "each agency shall by rule establish uniform procedures for the submission and consideration of applications" (5 U.S.C. 504(c)(1)). If an agency proposes to adopt these standards for use in its consideration of applications, this statutory language strongly suggests that the agency should set them out in the form of regulations. Moreover, if an agency intends to apply such standards consistently, considerations of fairness and efficiency would dictate advance public notice of the standards.

The narrow construction of the statutory language reflected in the Department's position is not supported by the legislative history. The Conference Committee, for example, characterized the provision quoted above as one that directs agencies to adopt "uniform implementing regulations with respect to application by prevailing parties for an award * * *." (H.R. Rep. 96–1434, 96th Cong., 2d Sess., at 23.) The House Judiciary Committee's report on S. 265 (a bill substantially identical to the Act as passed) describes the provision as one that "directs each agency * * * to establish uniform procedures governing the awarding of fees." (H.R. Rep. 96–1418, 96th Cong., 2d Sess., at 16.) In order to administer a statute effectively, an agency must of necessity define certain terms and make initial interpretations of the statutory provisions, and the Act, in our view, provides ample authority for agencies to adopt such rules.

We have for other reasons, however, eliminated the draft model rules' provision on transactions for the purpose of meeting a net worth standard. Demonstrating the purpose of such a transaction would be extremely difficult. Moreover, if the transaction is genuine, the party is in fact eligible, regardless of its purpose. We believe agencies should disregard a transaction that reduces net worth only when it is a sham transaction, and we think this type of determination can best be made on a case-by-case basis.

Affiliates: Division I of the D.C. Bar and some government agencies supported the draft rules' provision for aggregating the net worth of affiliated entities. The American Metal Stamping Association, on the other hand, said affiliated entities should be treated separately unless more than one of them is involved in a particular proceeding, and agencies including the CAB, USPS, and the National Labor Relations Board (NLRB) believe affiliation should be determined on a case-by-case basis, considering individual facts. HHS and DOE both said affiliation rules should be applied to individuals and sole owners of businesses as well as to

entities. The SEC said that it is a standard accounting practice to consolidate net worth when one individual or business controls more than 50 percent of another business, and also proposed expansion of the rule to provide for affiliate treatment when a business has two or more 20 percent to 50 percent owners who together own a majority interest. The Justice Department, on the other hand, said the reference to "individuals" in the affiliation definition could be difficult to apply.

In our view, the intent of Congress in passing the Act was to aid truly small entities rather than those that are part of larger groups of affiliated firms. The final model rule, accordingly, requires aggregation of net worth and employees when an individual or entity holds a majority interest in an applicant and when an applicant holds a majority interest in another entity, unless the adjudicative officer determines that such treatment would be unjust in light of the actual relationship between the affiliated entities. When an applicant owns less than 50 percent of an entity, we believe that the employees should not be aggregated, and that inclusion of the interest itself (rather than the second entity's entire net worth) in the assets of the applicant will ordinarily be adequate to reflect the applicant's net worth. (We note that the reference to "individuals" in the model rule refers only to those who own or control entities that are applicants; individuals who are themselves applicants could not be "owned" or "controlled" within the meaning of the rule.) We believe this rule identifies a clear case in which aggregation of net worth and number of employees is almost always justified, and applicants who fall within this definition will know from the start that they must provide aggregated eligibility data. Since we agree that the rule may not include all situations in which individuals or entities should be treated as affiliated, however, we have made clear in the rule that relationships other than majority control may constitute special circumstances that would make an award unjust.

Participation for others: Paragraph (h) of § 0.104 of the draft rules provides that applicants will not eligible when they are participating only on behalf of ineligible individuals or entities. USPS and the CAB suggested that participating *"only"* on behalf of others is too restrictive a standard. We have expanded the provision (now paragraph (g)) to include all situations where a party is participating primarily on behalf of others who are ineligible.

In reference to this provision, we specifically requested comments on how the rules should treat trade associations. The FTC said trade associations should not be eligible for awards if their members, when aggregated, would not be eligible (Acting Chairman Clanton disagreed, believing that associations should be eligible if almost all of their members would be eligible individually). Similarly, the Consumer Product Safety Commission, the Treasury Department, and Division I of the D.C. Bar said that trade associations should be ineligible for awards if they have members that would be ineligible individually. The American Metal Stamping Association commented that associations' eligibility should be determined on the basis of their own net worth and employees, not their members; it also said, along with the National Screw Machine Products Association, that otherwise eligible applicants that consult with their trade association about litigation should not become ineligible on that account.

Of course, trade associations may sometimes become involved in litigation on their own account (*e.g.*, as employers) as well as in the interests of their membership. On reflection, we believe the best way of handling this situation is through the provision on participation on behalf of others. When a proceeding involves a trade association independent of its membership, the association's eligibility should be measured individually, like any other applicant's; when an association is representing primarily the interests of its members, the agency can examine the facts of the particular situation. One factor, for example, that an agency might consider is whether the association is financing its participation in the litigation out of its general budget or through special assessments against members that have agreed to participate. In the latter situation, the agency might look closely at the eligibility of the particular participating members.

We also asked for comments on how to treat situations in which an ineligible party and an eligible one are represented by the same counsel. Division I of the D.C. Bar believes that, in these situations, the ineligible party effectively represents the eligble one, and no award should be made. The FTC said the eligible party should be entitled to an award for the amount it agreed to pay before the proceeding began, while DOE thinks the award should be a *pro rata* share of the total fee, based on the total number of parties commonly represented. This approach, according to DOE, will avoid collusion whereby the eligible party agrees to pay a disproportionate share of the fee. We think the rules should not provide one solution for these situations; when they arise, the adjudicative officer can consider all the facts in determining whether and in what amount to make an award.

Intervenors: The National Screw Machine Products Association, the National Association of Manufacturers, and DOE suggested that the rules should limit or eliminate the eligiblility of intervenors. We don't believe that the Act provides for this. We note, however, that situations in which intervenors actually receive awards will probably be rare. The Act excludes rulemaking, licensing, and ratemaking proceedings, in which voluntary intervention is very likely. In adversary adjudications such as enforcement proceedings, intervention by parties without a direct financial stake in the outcome is relatively infrequent, so the Act seems unlikely to become a substantial source of funds for advocacy organizations promoting generalized points of view in agency proceedings.

The Department of Transportation (DOT) suggested, in response to a question in our request for comments, that the eligibility of intervenors should be determined as of the date of intervention, provided that agencies will disregard any transactions undertaken between the initiation of the proceeding and intervention solely in order to make the party eligible. As noted above, however, we have concluded that the statute requires a determination of eligibility as of the date the proceeding is initiated.

Standards for Awards.

In § 0.105, the draft model rules set forth the standards for making awards under the Act; we asked for comments on whether the rules should provide more detailed standards. No commenters recommended this approach; the NLRB, the SEC and Division I of the D.C. Bar agreed with our tentative conclusion that these standards would have to be developed on an agency-by-agency and case-by-case basis. Division I, in fact, suggested that we delete the definition of a substantially justified position as one that is "reasonable in law and fact." The phrase, however, is borrowed verbatim from the legislative history (*see* Conference Report on H.R. 5612, H.R. Rep. 96–1434, 96th Cong., 2d Sess., at 22). (The phrase was erroneously transcribed as "reasonable in fact and law" in the draft rules; we have reversed the order to conform to the legislative

history.) We believe it reflects the Congressional intent, and we have retained it. Several commenters stated that the rules' reference to a reasonable position "at relevant times" is confusing; we agree and have deleted this phrase.

The Treasury Department, the Justice Department, the Department of Education, DOT, USPS and the FTC were concerned with the rules' provision for awards based on the agency's position on ancillary or subsidiary issues. We have revised this rule and § 0.204 (concerning when applications may be filed); the reasons for our revision are discussed below, in connection with § 0.204.

USPS raised a number of questions about the agency's burden of proof of its substantial justification: is it merely a burden of producing evidence or is it a burden of persuasion? DOT reads the Act not to assign this burden of proof to the agency. The Act provides that an application for an award need include only an allegation that the agency's position was not substantially justified; the Conference Report (H.R. Rep. 96–1434, *supra*, at 22) states that "[a]fter a prevailing party has submitted an application for an award, the burden of proving that a fee award should not be made rests with the agency." This appears clearly to indicate that the burden of persuasion that an eligible prevailing applicant should not receive an award rests with the agency. Some commenters suggested that, if the rules mention burden of proof at all, they should provide explicity, that the applicant has the burden of proving eligibility. We have revised § 0.104, on eligibility, to make this clear.

The Interior Department said the draft rules incorrectly imply that some form of misconduct by an applicant is necessary for a finding that special circumstances make an award unjust. This was not our intent, and we have revised the provision.

According to the International Trade Commission, the rules should cover situations where private parties take the same position as the government (for example, third-party complaint cases in which the government supports one side). The Commission recommends that awards be limited to fees and expenses directly caused by the government. While there may certainly be cases in which the limited role of the government or the aggressive tactics of the private party would make such a limitation appropriate, agencies that have chosen to participate in proceedings should not be able to avoid awards by relying on private parties to support their positions. We think this problem should be handled on a case-by-case basis.

In response to several comments, we have eliminated the provision on awards of fees and expenses incurred before the beginning of the proceeding. We think such fees will occasionally be recoverable, since activities like the drafting of a complaint will necessarily occur before the proceeding begins. We agree, however, that inclusion of a specific provision on this subject may mislead applicants as to the scope of the fees available under the Act.

Allowable Fees and Expenses

Section 0.106 describes the fees and expenses awardable under the Act. Several commenters questioned its reference to "prevailing market rates" for the services of attorneys, agents and witnesses. Some contend that the purpose of the Act is reimbursement, and awards should never exceed the actual fees charged. (Based on similar reasoning, some commenters said actual attorney fees charged should be awarded even when they exceed the statutory cap of $75 per hour; the statute, however, authorizes fees in excess of $75 per hour only where agencies have so provided by rule.) Others believe that the "prevailing market rate" should not apply to in-house attorneys.

The Act explicitly provides for awards at "prevailing market rates for the kind and quality of the services furnished," up to the ceilings for attorneys and experts (5 U.S.C. 504(b)(1)(A)); the model rules follow the statutory mandate. On reflection, however, we are persuaded that the "prevailing rate" for in-house attorney services may be different from that for outside counsel, and this is reflected in the final rules.

The General Services Administration suggested that the Conference or the Justice Department should circulate reports of prevailing fees in various localities; we think, however, that this task would be unmanageable and would not take into account differences in rates for particular fields of legal practice. We agree with the SEC's suggestion that agencies work out their own standards for determining prevailing rates.

We requested comment on whether the rules should deal with awards for *pro se* representation and, if so, what they should provide. The NRC said the rules should offer guidance on this question, while the FTC said they should not. DOE commented that *pro se* services should be compensable only when the party is an attorney.

The courts have split on whether to award attorney fees to *pro se* litigants under existing statutes. Compare *Crooker* v. *Department of Justice*, 632 F. 2d 916 (1st Cir. 1980), with *Cox* v. *Department of Justice*, 601 F. 2d 1 (D.C. Cir. 1979). Moreover, Congress has provided no guidance on this question, either in the Act or in its legislative history. We have decided not to cover this issue in the model rules. We think agencies should deal with the question, if it arises, on a case-by-case basis.

The third paragraph of § 0.106 lists certain factors to be considered in determining the reasonableness of the fees requested, with the primary emphasis on the attorney's regular rate. (We have added, for in-house attorneys, a reference to fully allocated cost.) Division I of the D.C. Bar supported the rules' focus on the regular rate, while the Treasury Department, the Justice Department, and NASA noted that cases under other laws identify as many as twelve factors to be considered and suggested that the rule include some or all of these. Ordinarily, we think the lengthy lists of factors applied in court cases will be too elaborate and complex to be easily adapted to an administrative context. We did not intend for our listed factors to be exclusive, however; where warranted, an adjudicative officer should certainly be free to take additional factors into consideration. We have adopted NASA's suggestion that we explicitly state that the factors that may be considered are not limited to those listed.

DOE and Kenneth E. Malmborg, a Member of the Conference, suggested inclusion of an additional factor—whether the time spent was reasonable in relation to the value of the client's interests. While this may frequently be a relevant consideration, we are reluctant to identify it as a factor of major importance. The clear implication of the purpose clause of the Act, combined with its legislative history, is that litigants should not be forced to pay fines or otherwise settle litigation with the government when their legal position is sound, simply because the amount at stake is less than the cost of litigation. Emphasizing the suggested factor might imply that litigants are not entitled to fees when it would have been cheaper to settle.

The Justice Department, adopting a narrow interpretation of the statutory language, questioned whether expenses of attorneys are compensable under the Act. We believe that they are compensable. The Act provides for the award of "fees and other expenses" and explains, in 5 U.S.C. 504(b)(1)(A), that these include the reasonable expenses of expert witnesses and the reasonable

cost of studies or tests as well as reasonable attorney or agent fees. We think the purpose of this provision is expressly to cover specific items of expense that might not otherwise be included and that might be payable to someone other than an attorney, rather than to prohibit reimbursement of attorneys' out-of-pocket expenses. In other statutes providing for the award of fees, the phrase "reasonable attorney's fee" has been interpreted to include the attorney's out-of-pocket expenses ordinarily chargeable to clients as well as charges for the attorney's time. See *Northcross* v. *Board of Education*, 611 F. 2d 624, 639 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). The House Judiciary Committee Report on S. 265 supports our conclusion that Congress intended to cover out-of-pocket expenses in the Equal Access to Justice Act as well. That report states that the $75 ceiling on fees applies only to the services of the attorneys themselves, and not to "their overhead expenses or other costs connected with their representation." (H.R. Rep. 96–1418, 96th Cong., 2d Sess., at 15.)

Several commenters said the model rules should identify particular expenses of attorneys and witnesses that are compensable, while the FTC and Division I of the D.C. Bar said individual agencies should make these determinations. Commenters also took varying positions on whether paralegal costs should be chargeable as expenses. We do not believe the rules should discourage the use of paralegals, which can be an important cost-saving measure. On the other hand, lawyers' practices with respect to charging for paralegal time, as with respect to other expenses such as duplicating, telephone charges and the like, vary according to locality, field of practice, and individual custom. We have decided not to designate specific items as compensable expenses. Instead, we will adopt a suggestion of the Treasury Department and revise the model rule to provide that expenses may be charged as a separate item if they are ordinarily so charged to the attorney's clients.

USPS and George Reichenbach objected to the inclusion of the $24.09 per hour cap on expert witness fees. USPS stated that the rules should simply track the statute in case some agencies are authorized to pay higher rates, and Mr. Reichenbach contended that it is unfair to authorize higher rates for attorneys than for expert witnesses. We included the $24.09 figure because we believe it will be widely applicable. It is in brackets, however, precisely because some agencies may be authorized to pay a different rate. Agencies should, of course, include in their own rules whatever figure is applicable to their activities. Mr. Reichenbach's complaint is with the Act, not the model rules; we do not have authority to equalize the ceilings for attorneys and expert witnesses.

The General Services Administration suggested that the rules provide for an interagency exchange of information to prevent multiple billings. We believe the circumstances in which this might occur are rare; when they do arise, existing informal channels of communication should be adequate to deal with the problem.

HHS proposed a provision that any reimbursement an applicant has already received from the government (for example, under funded participation programs) be deducted from any award. We certainly agree that applicants should not be entitled to double payment. Again, however, we believe that this situation will not arise with sufficient frequency that the model rules need contain a special provision to deal with it. If it does occur, we believe it can be handled under the Act's provision for denying awards in "special circumstances."

HHS also expressed concern that awards not be available for studies required by statute, such as the tests new drug sponsors must make to demonstrate their products' safety and effectiveness. We do not think this will be a problem. To be compensable, studies and tests must be necessary to the preparation of the party's case, which we interpret to mean conducted for that purpose. The specific drug tests mentioned, if found to be conducted for the purpose of litigation at all, would presumably be conducted in connection with initial licensing proceedings not covered by the Act. If problems of this type arise, however, we think they can best be dealt with by particular agencies familiar with the relevant statutory provisions.

The American Metal Stamping Association and the National Screw Machine Products Association said awards should include the full cost of studies and tests, regardless of "reasonableness." The Act, however, authorizes payment of only the "reasonable cost" of such items (5 U.S.C. 504 (b)(1)(A)).

Rulemaking on Hourly Rates

Section 0.107 of the model rules (§§ 0.601 and 0.602 of the draft rules) explains that agencies have authority to raise the ceiling on hourly rates of attorneys by rulemaking, and describes how petitions for rulemaking should be filed. Division I of the D.C. Bar supported the provision generally, suggesting addition of a deadline for completion of agency rulemaking proceedings begun in response to rulemaking petitions. The Treasury Department said the rulemaking provisions should be eliminated and the question of whether to raise the ceiling left to Congress in its 1984 review of the Act. The Interior Department proposed removal of the reference to rulemaking petitions, because it might suggest a greater receptivity to such petitions than actually exists and might duplicate existing rules.

We have decided to retain the substance of these provisions, revised and combined into a single section for clarity. While Congress can certainly reconsider the maximum rate, it explicitly authorized agencies to raise the ceiling if warranted. The Treasury Department's approach would read this provision out of the Act. There is some merit to the Interior Department's position; where agencies already have rules regarding petitions for rulemaking, they may not need to adopt the full text of the model rule. We believe, however, that at least a cross-reference to such general rules should be included in agencies' Equal Access to Justice regulations. Finally, we don't think a specific deadline of the type requested by Division I of the D.C. Bar is practicable. It is reasonable to commit an agency to decide whether to explore a rulemaking question within a definite amount of time, but the amount of time necessary to conduct that exploration and reach a final decision is simply too contingent on the issues in the proceeding, and on the status of the agency's entire agenda, to be predicted accurately.

HHS has asked that we include a provision that higher rates adopted in rulemaking proceedings should apply only to services provided on or after adoption of the rule. We believe this is an issue to be resolved in the rulemaking proceedings themselves, rather than by the model rules. HHS has also suggested that agencies be permitted to reconsider denials of rulemaking petitions, and that no appeal be permitted from final agency decisions on rulemaking petitions. The former provision is not really necessary, since agencies can simply initiate proceedings on their own motion; an agency that customarily entertains petitions for reconsideration of denials of rulemaking petitions, however, can do so here as well. As to the second point, we question whether an agency can legally restrict, by regulation or otherwise, any

right a party may have to appeal its decisions.

Proceedings Involving Two Agencies

Section 0.108 of the rules deals with awards in situations where one Federal agency participates in a proceeding before a second agency; the draft provision stated that agencies would condition other agencies' participation in their proceedings on the other agencies' agreement to honor any resulting award decisions. While some private commenters supported this provision, many government agencies expressed doubt about the wisdom of the provision and about their legal authority to limit other agencies' participation in this manner. Commenters did not agree on whether the Act applies in two-agency situations. The Federal Mine Safety and Health Review Commission, for example, said that it would be logical to interpret the Act to apply to proceedings the Department of Labor brings before the Review Commission, and Division I of the D.C. Bar, the American Metal Stamping Association, and the National Screw Machine Products Association also believe the Act applies in two-agency situations. The Justice Department and some other agencies, however, state that the Act refers to awards by "the agency" based on the position of "the agency," and cannot be construed to apply where two agencies are involved.

We continue to believe that two-agency situations are within the coverage of the Act. Section 203 of the Act (5 U.S.C. 504(b)(1)(C)) defines the adversary adjudications covered by the Act as those in which the position of "the United States" is represented, not just the position of the particular agency conducting the adjudication. Additionally, the Act provides in (5 U.S.C. 504(d)(1)) that awards may be paid by "any agency over which the party prevails," rather than by "the agency." While the question is a difficult one, we believe our interpretation is consistent with the language and purpose of the Act. Moreover, the testimony of witnesses at hearings on related bills and statements during the floor debate preceding passage of the Act include frequent references to OSHA proceedings, which involve two agencies—the Department of Labor as litigator and the Occupational Safety and Health Review Commission as decider. (*See e.g.*, Statement of Senator DeConcini, *Congressional Record*, September 26, 1980, at S.13690; Statement of Rep. Symms, *Congressional Record*, October 1, 1980, at H.10229.) This strongly suggests that Congress intended to include such proceedings. While there is no such explicit reference to proceedings involving litigating units of both the deciding agency and an intervening agency, we think these too are within the intendment of the Act. (In any event, we think the situations in which the position of such an intervening agency, which is not the primary litigator in the case, will justify an award will be rare.)

We agree, however, that the draft rules' provision conditioning participation on agreement to honor awards is impractical; in many situations in which two agencies will be involved, the agency that is a party to the proceeding will have a statutory right to participate. Accordingly, we have revised § 0.108 to provide that awards will be made against other agencies when their positions have led to the awards.

DOT has asked for guidance on how fee awards should be allocated when the Justice Department represents other agencies in court. Since this question does not relate to the part of the Act that applies to administrative proceedings, it is beyond the scope of the model rules.

Subpart B—Information Required From Applicants

This subpart of the model rules details the information an applicant should provide to demonstrate that it is entitled to an award. HHS said the Conference should develop and clear a standard application form. We don't believe the necessary information is sufficiently complicated to require a form, which seems a burdensome bureaucratic detail. The information can be clearly and completely presented in narrative form, like a simple legal pleading, with appropriate supporting material and exhibits.

Two commenters discussed the basic application described in § 0.201. The National Screw Machine Products Association said that an applicant should not have to state the specific issues on which the government's position was not substantially justified, while DOE said an applicant should have to explain why the government's position was unjustified. We have removed the reference to specific issues, which may be confusing. The rules retain, however, a requirement that the applicant identify the agency's allegedly unjustified position; we think this is not a burdensome requirement and will facilitate consideration of an application, especially where, for example, both covered and excluded claims are litigated in one proceeding, or more than one agency (or agency unit) participates in a proceeding. We believe the Energy Department's suggestion goes beyond the terms of the statute, which refers only to an "allegation" that the agency position is unjustified.

DOE also suggested that tax-exempt organizations be required to show that they are listed in IRS Bulletin 78 at the end of a proceeding as well as the beginning, in case the first listing is an error. However, we have revised this provision to refer to IRS rulings on tax-exempt status rather than to Bulletin 78.

We have added one item to the contents of the application on our own initiative—for applicants other than individuals, a brief description of the type of entity or business. We are seeking this information for use in our annual report to Congress, so that we will be able to describe the types of entities most frequently benefiting from the Act.

Net Worth Exhibits

Section 0.202 describes the contents of net worth exhibits (called "statements of net worth" in the draft rules) to be submitted by applicants other than tax exempt organizations and agricultural cooperatives. We have revised this section considerably from the draft provision, which prescribed a standard form statement with a specified breakdown of assets and liabilities and provided alternatively for submission of an optional form statement in a format convenient to the applicant. The final model rule eliminates the "standard form" concept in favor of having all applicants submit information on their net worth in a format of their own choice, whether a statement or schedule prepared for another purpose, such as a tax return or loan application, or an exhibit developed expressly for the application. Where the presentation made is insufficient, the rule provides that the adjudicative officer can request more information from the applicant. NASA suggested that the "optional form" approach would be too complicated, but we believe that allowing applicants some flexibility will be an effective way of reducing needless burdens on applicants that are obviously eligible, while still obtaining the information necessary to make an eligibility determination.

The SEC said the rules should not require detailed net worth information in any form. It believes this requirement will be burdensome to clearly eligible applicants; instead, the agency can ask for additional information when warranted. This approach, the SEC suggested, will also be a more effective way to protect the confidentiality of net

worth information than the measures proposed in the draft rules (discussed below). This proposal has some merit, and prompted our simplification of the net worth exhibit requirement. We are not willing to drop the net worth exhibit altogether, however, since we are concerned that a simple assertion of eligibility will not provide agencies with enough information to evaluate net worth, or even to decide when more information should be obtained. To meet their obligation to ensure that awards go only to eligible applicants, we think agencies should generally require the submission of some detailed information on net worth. On the other hand, where agencies have some independent means of verifying eligibility, the SEC approach would be workable and timesaving. For example, a regulatory agency that already keeps extensive financial data on the businesses it regulates, or that has legal authority to perform random audits on some applicants to verify eligibility, may prefer this approach, and we recommend it for such agencies. To provide adequate public notice, such an agency should describe in its own rules whatever alternative method may be available for an applicant to establish its eligibility.

USPS suggested that applicants verify eligibility with audited net worth exhibits. We think this requirement is too burdensome, however, especially for individuals and for applicants who are far below the eligibility ceilings. Nor will we adopt the Treasury Department's suggestion that an applicant attest specifically to its net worth exhibit; the rules require verification of the application, which includes statements concerning the applicant's eligibility, and we believe this is adequate.

Valuation of assets: One controversial aspect of the draft rule was its provision that determinations of net worth may be based on either acquisition cost or fair market value of assets. The exact meaning of "net worth" is not described in the Act or the Conference Report, although Committee reports on S. 265 state that acquisition cost should be used. We interpreted this as a Congressional intent to permit a low valuation, and provided for the use of fair market value where that is lower. The American Metal Stamping Association supported this approach, but NASA, the Treasury Department, the Justice Department and HHS objected to it. NASA believes all determinations should be based on fair market value. The other agencies said the legislative history of S. 265 should be followed exactly; they noted that acquisition cost would avoid the need for appraisals and would also exclude adjustments to basis for items like depreciation or capital additions. As a compromise, DOE suggested that fair market value be used only when it is lower and reasonably provable. In revising the rule to give applicants more flexibility in demonstrating their net worth, we have eliminated the reference to any standard of valuation. Applicants that are clearly eligible will probably be able to demonstrate eligibility regardless of the standard used and should be permitted to submit net worth information using whatever standard is convenient. Where there is a real question about eligibility, applicants and agencies may take into account the reference to acquisition cost in the legislative history of S. 265; in most cases, we believe this will work to the applicant's benefit.

Confidentiality: Several commenters discussed the draft rules' provision for confidential treatment for net worth exhibits. Division I of the D.C. Bar suggested that the rules provide greater protection for this information by permitting only *in camera* inspection of the exhibits, while the American Metal Stamping Association and the National Screw Machine Products Association recommended that net worth exhibits be reviewed only by neutral third parties, such as accountants. Several agencies were concerned that the rules appeared to prejudge Freedom of Information Act (FOIA) requests without reference to the particular information in question, and a few said that confidential treatment of net worth exhibits might complicate verification of net worth information and invite fraud.

We continue to believe that applicants should have an opportunity to seek confidential treatment of their net worth information, to the extent it is legally available; we understand, however, that this information may frequently not be exempt from disclosure under FOIA. Although the draft rule was not intended to preclude disclosure of net worth information when required by FOIA, it would impose considerable burdens on agencies by requiring special handling even for material ultimately found to be disclosable under that law. As suggested by the CAB, we have revised the rule to place on an applicant seeking confidential treatment for net worth information the burden of demonstrating that it is entitled to such treatment, in a motion presented to the adjudicative officer. If the adjudicative officer denies the motion, the material will be made public; otherwise, any FOIA request for the information will be handled under standard agency FOIA procedures.

Documentation of Fees and Expenses

Section 0.303 describes the documentation of fees and expenses to be submitted. USPS and HHS said the rule should provide for a breakdown of hours spent on issues not covered by the Act, as well as those covered, in cases where both types of issues are involved. We don't think this should be required as a general rule; where the fee request submitted in such a case seems excessive, the adjudicative officer can require such information. GSA asked that attorneys or witnesses certify to the accuracy of billing. This should not be necessary in most cases; an adjudicative officer can raise questions about the hours or rates shown if the figures presented seem unreasonable, and will in any event award only a reasonable amount for the services.

Prevailing Parties

Section 0.204 deals with when parties may file an application for an award; it presents some difficult legal questions. The draft rule provided that a party must apply for an award within 30 days after final disposition of a proceeding, and may also apply at any earlier time that the party believes it has prevailed with respect either to the entire proceeding or to a significant ancillary or subsidiary issue. The legislative history (*see* H.R. Rep. 96–1434, 96th Cong., 2d Sess., at 21–22) clearly indicates that Congress intended "prevailing" to include some situations in which the entire proceeding has not yet been fully disposed of, such as when a party obtains an interim order of central importance or wins an interlocutory appeal on a significant, separable issue. Application of these principles in an administrative context is difficult, the more so because the Act, in apparent contradiction to this legislative history, provides that agencies may not make awards in proceedings when judicial review has been sought (5 U.S.C. 504(c)(1)). As a result, some agencies have suggested that we provide that awards may never be sought before final disposition of all the issues in a proceeding, or that these questions be handled on a case-by-case basis, rather than through rules. The FTC, citing *Hanrahan v. Hampton*, 100 S. Ct. 1987 (1980), and *Smith v. University of North Carolina*, 632 F. 2d 316 (4th Cir. 1980), recommended either a case-by-case approach or revision of the rule to refer to significant, separable "substantive claims" rather than "ancillary or subsidiary issues."

We agree with the FTC that the current case law under other statutes apparently requires the final disposition of some substantive part of the case, rather than just a victory on a purely procedural issue, for a party to be considered "prevailing," and we have revised the rule accordingly. This is not inconsistent with 5 U.S.C. 504(c)(1), because of the requirements that the disposition be final and the portion of the proceeding be separable. If, for example, certain claims are finally dismissed or favorably settled while others go to hearing, a party may have prevailed with respect to the dismissed or settled claims, which will not ordinarily be subject to judicial review. Whether such separate treatment is appropriate will, of course, have to be decided on a case-by-case basis.

HHS contends that the rules apparently permit parties who win partial victories in final dispositions to be treated as "prevailing," and that they should not receive this treatment. While this question is not without difficulty, we disagree. If a party can prevail by winning on a separable claim before disposition of the rest of the case, then it can presumably do so by winning on the claim at the same time as the rest of the case is disposed of. Whether it has prevailed will perforce have to be decided on a case-by-case basis, taking into consideration the significance and nature of the claims involved in the proceeding and the relationships among them. Where several claims are related to a single incident or set of facts and the government wins most of them, for example, it may be determined that the private party has not "prevailed" even though the government lost the additional claims. On the other hand, where essentially unrelated claims of relatively equal significance have been handled together for administrative convenience, we think a party may prevail as to one although it loses the other.

USPS suggests that we include other possible final dispositions of cases in our listing. We have revised the provision to avoid any inadvertent exclusion of possible final dispositions; this is a complex area, however, and we recommend that agencies review the provision carefully to determine whether it accurately reflects their own practices. The Justice Department has suggested a different interpretation of the Act's reference to "final disposition" of a proceeding. Analogizing to judicial proceedings, it contends that final disposition occurs when the agency issues its final order, and not when the period for seeking reconsideration has passed. We think a party might reasonably file an application as soon as such an order has been entered. Since the 30-day deadline may well be interpreted by the courts as an unwaivable statutory bar to late filing, however, we think the fairer practice is to permit the filing of an application up until 30 days after the last date on which petitions for reconsideration could have been filed. If another party seeks reconsideration, the award proceeding would ordinarily be delayed in any event, pending an agency decision on reconsideration and possibly (if, for example, another private party is involved) judicial review. A new provision in the model rules (§ 0.204(b)) incorporates this point. Indeed, the applicant itself may be seeking reconsideration of some aspect of the decision, and thus be unlikely to conclude that a final disposition has occurred.

Subpart C—Procedures for Considering Applications

This subpart contains procedure to be used in the consideration of applications. Our goal on drafting these rules has been to keep the procedures as simple and as compatible with existing agency procedures as possible. Some commenters have suggested that the rules will conflict with existing agency procedures; the Treasury Department said that almost all of subpart C should be eliminated for this reason. We disagree. Inevitably, there may be overlaps or conflicts between these rules and some existing agency procedures; we would expect that individual agencies will resolve these by harmonizing the two sets of rules in whatever way seems most effective. In this area, agency practices vary so widely that complete uniformity will be impossible. For some agencies with extensive procedural rules, in fact, much of this subpart may be replaced by cross-references to existing rules. Other agencies, however, may have few formal proceedings and few detailed procedural rules. For the benefit of agencies like these, we think the model rules should include an essentially complete treatment of the formal procedural aspects of the awards process.

Similarly, we have retained specific time limits in the model rules even though some commenters said that the limits provided were too short, and that agencies should adopt their own limits based on actual practice. (We have, however, changed some particular time limits in response to the comments.) If the limits prove impracticable for individual agencies, they may, of course, modify them.

Other commenters made some general suggestions about subpart C. The American Metal Stamping Association and the National Screw Machine Products Association said that agencies should be required to include a notice about the Act and the procedure for applying for awards on all their citations or other documents initiating proceedings. This is an interesting suggestion, and agencies that deal frequently with parties who may not be familiar with the Act or with the agencies' own procedural regulations may wish to consider providing some sort of notice of the Act's existence. As a general matter, however, we don't believe such a notice is necessary; if agencies have regulations describing the Act and the relevant procedures, an attorney who has undertaken to represent a party before the agency should ordinarily be responsible for knowing about them. The National Screw Machine Products Association also asked the Conference to require agencies to publish their proposed rules by July 1, 1981; this would be beyond our statutory authority, however. Finally, HHS was confused by our use of the term "agency counsel," since agency lawyers may participate either as adversaries in a proceeding or as advisors to the deciding officer or body. As we explained in our request for comments, we have used the term "agency counsel" for convenience to designate the agency unit that is a party to a proceeding. For clarity, we recommend that individual agencies substitute the names of the relevant agency units or some other more specific term.

Pleadings and Time Limits

Section 0.403 of the draft rules set a deadline for agency answers to applications and described the types of answers that may be filed. This provision (now § 0.302) has been revised and simplified in response to the comments. Numerous agencies stated that 15 days would be inadequate time to prepare a complete answer, and we have substituted 30 days. At the suggestion of the Treasury Department, we have deleted the provision requiring the filing of a consent if the agency counsel does not object to an award. We have retained in somewhat modified form, however, the provision that agency counsel's silence will be treated as consent unless an extension of time has been requested. The Justice Department contended that this provision is equivalent to a default

judgment against the United States. While we do not agree, since the adjudicative officer of the agency will still have an opportunity to review the application and determine whether an award should be made, we have revised the provision to permit, but not require, treatment of failure to answer as consent.

We have also revised the provision permitting 30-day postponement of the filing of an answer pending settlement negotiations to clarify that it was not intended to limit such negotiations to 30 days. The SEC so interpreted the draft provision.

The CAB asked us to specify whether the time limits are calendar days or workdays. We intended calendar days. We are not including a provision to this effect because we anticipate that most agencies that conduct adversary adjudications will have such a rule in their general rules of procedure; if not, however, agencies may wish to specify calendar days. The CAB also suggested that the adverse effects on an applicant of a long award proceeding could be reduced by requiring the agency to tender any non-controversial part of an award within 60 days after receiving an application. This is an interesting idea that individual agencies may with to consider. However, since we are not sure it would be practicable for all or most agencies, we are not including it in the model rules.

The Treasury Department saw no need for the rules to provide for replies, as they do in § 0.303, since the agency counsel will be making an affirmative case on the issue of substantial justification, we believe the applicant should have an opportunity to respond, and we have retained the section.

Division I of the D.C. Bar supported the rule (now § 0.304) permitting other parties to a proceeding to comment on an application for an award or an answer. NASA and the Treasury Department contended that these parties should not participate in award proceedings in any way, while the Capital Legal Foundation said organizations not parties to a proceeding, such as other government agencies and public interest groups, should be allowed to comment. We believe the original draft rule provides the best approach. As a result of their participation in the proceeding, other parties to a proceeding may have some valuable information about a party's eligibility or insights into the justification of the government's position, but award proceedings should not be delayed by the intervention of new parties, nor by extensive participation of parties other than the applicant and the agency counsel. We have changed the time limit for comments on an application to conform to that for an answer.

Settlement Procedures

Section 0.305 of the rules permits a settlement of an award, either in connection with a settlement of the underlying issues or after the underlying proceeding has been concluded. DOT suggested that settlement negotiations on awards may prejudice later determinations of whether an agency's position is substantially justified. We think this problem can best be avoided by developing a sound agency policy on when to undertake settlement negotiations, rather than by forbidding settlements of awards. Capital Legal Foundation expressed concern about permitting award settlements to be included in settlements of the merits of a proceeding, because of increased pressure on the government to settle and because of possible conflicts of interest between attorneys and their clients. While these concerns are legitimate, we think these risks are unavoidable. In settling the merits of a case, both parties will have in mind the possibility that an award of attorney fees may follow. Where it is probable that no award will be made because the private party has not prevailed or the government's position is substantially justified, the possibility of an award should have little influence on the negotiations, and will not pressure an agency into an unfair settlement. But if an award is a likely possibility, it will affect settlement negotiations even if, as a technical matter, the settlement process involves two separate steps. The agency counsel could simply agree not to contest a later application for an award of a certain amount. The Justice Department agreed with this analysis and supported the rule as drafted; we have decided to retain it in that form.

DOE said that the model rules should provide special settlement procedures, since agencies' existing procedures vary so widely, and the Interior Department recommended that adjudicative officers review settlements, since they will be familiar with the record. We have decided not to change the draft rule in response to these comments. Precisely because agencies' settlement procedures vary, we think they should use their own normal procedures to approve award settlements. A separate procedure, differing from that generally applicable within the agency, will be burdensome and increase the costs of administering the Act. Some existing agency procedures already involve adjudicative officers in the settlement review process; agencies without such procedures may wish to gain the benefit of the officer's knowledge of the record and the attorneys' performance by voluntarily seeking an opinion or recommendation from the adjudicative officer. Without a sense of how time-consuming or cumbersome this would be in particular agencies, however, we are not disposed to include a requirement of consultation with the adjudicative officer in the model rules. (It should be noted that, if the agency counsel merely consents to the award requested, the application will be before the adjudicative officer for review in any event. Only where the proposed award is part of a negotiated settlement will the agency follow settlement procedures that may bypass the adjudicative officer.)

The Justice Department questioned why the rules provide that a proposed settlement of an award that is agreed upon before an application has been filed must be accompanied by an application. There are three reasons. First, the Act appears to require the filing of an application before an award may be made; second, the information in the application will permit the agency unit with authority to approve settlements to review the reasonableness of the settlement; and, finally, the information in applications will provide the data base for the annual reports to Congress that the Act requires the Chairman of the Administrative Conference to prepare. We have, accordingly, retained the requirement.

Further Proceedings; Decision

Section 0.306 describes the further proceedings to be conducted when necessary to develop a complete record on an application. DOT pointed out that elaborate proceedings will be costly, and that adjudicative officers should be able to handle all situations in which more information is necessary by ordering written submissions. While we agree that oral evidentiary hearings on award applications should almost never be necessary, we can imagine situations in which they should be held. We have, however, revised the rules to emphasize the simplest approaches and to make clear the extraordinary nature of extended or formal proceedings on award applications.

Four commenters discussed the draft rules' provision that adjudicative officers should issue award decisions as promptly as possible. The CAB and the Atlanta Regional Commission said the rules should include a firm time limit for decisions, while USPS said they should not; NASA suggested a change to "as

soon as practicable." We agree that firm limits are a good idea (see Administrative Conference Recommendation 78–3, *Time Limits on Agency Action*, 1 CFR § 305.78–3); not only should the deserving applicant be able to get an award promptly but, since the decision turns largely on factors within the judgment of the adjudicative officer, the decision should follow as closely as possible the proceeding on the merits. However, we don't think the model rules can realistically include a single uniform deadline for decision, since the workloads of individual agencies and the complexity of the particular types of cases they handle vary widely. We have accordingly revised the rule to provide for a specific time limit of each agency's choice.

Agency Review

Several agencies objected to § 0.409 of the draft rules, which provided that an adjudicative officer's decision is reviewable by the agency under ordinary standards, except that the decision as to certain issues explicitly assigned in the Act to the adjudicative officer is reversible only for abuse of discretion. HHS, the FTC, the NLRB, and the Treasury Department all said the Act should be interpreted to fall within 5 U.S.C. 557, providing broad agency authority to review and modify the decisions of administrative law judges, since there is no explicit indication to the contrary. They noted that use of an abuse of discretion standard for review of adjudicative officers' decisions on certain issues could result in arbitrary and erratic development of the law on those issues, since the agency would not be able to develop consistent standards through the review process, and that the term "adjudicative officer" may be interpreted to mean the agency itself, when it makes a final decision. Division I of the D.C. Bar, on the contrary, said the adjudicative officer's entire decision should be reversible only for abuse of discretion. The Justice Department, while expressing no opinion, noted that the Act can be read to provide that the adjudicative officer's decision is unreviewable except in court.

On reflection, we agree with those agencies that believe the standard of review in 5 U.S.C. 557 applies to decisions on applications for attorney fees, and the final model rule (§ 0.308) does not include a special standard of review. While the Act can admittedly be interpreted as the Justice Department has suggested, there is no clear indication that Congress intended to adopt such an unusual and potentially impractical procedure. Instead, we believe Congress mentioned the adjudicative officer in order to ensure that the initial ruling on an application would be made by someone with direct knowledge of the underlying proceeding. If Congress meant to depart so substantially from customary agency practice in adjudications under the Administrative Procedure Act, we believe it would have done so explicitly.

USPS and NASA raised questions about the section's provision that agency review is discretionary; USPS said the availability of review should parallel its availability in the underlying case, while NASA said review should be in the form of reconsideration by the original decider, not higher level review. We believe these concerns are related to problems unique to particular agencies and situations, and should accordingly be handled by the agencies involved.

In miscellaneous comments on § 0.308, USPS asked that we define "adjudicative officer" to include both the officer presiding over initial proceedings and the officer or officers presiding over review proceedings, and that we clarify that a decision on a fee award cannot be final until there is a final decision on the merits of the case. As to the first point, we do not agree as a general matter with USPS' interpretation. We believe that the "adjudicative officer" is ordinarily the person who hears the evidence and sees the efforts of the attorneys, rather than a reviewing body, although there may, of course, be situations in which a reviewing body or group of officers itself performs that function. The second point, we believe, needs no clarification. The rules already provide that a party prevails only when final disposition of a proceeding or a separable part of the proceeding has occurred. Finally, the Consumer Product Safety Commission said the rules should acknowledge an agency's authority to review the agency counsel's consent to an award as well as the adjudicative officer's decision. This is already provided for under the rules, since an award application to which the agency counsel has consented will be before the adjudicative officer for decision.

Section 0.309 of the rules contains a reference to the statutory provision for judicial review. The Atlanta Regional Commission said the rules should provide that fees for court review of an agency fee decision should be recoverable; this is a matter to be determined in the first instance by the courts, rather than by agency regulations. The National Screw Machine Products Association suggested that judicial review of awards should be in the Federal court closest to the applicant. This is a legislative matter, however, and not one within the agencies' competence.

Section 0.310 explains how applicants that have been granted awards may obtain payment. The Treasury Department noted that there is much confusion about the Act's provisions on payment of awards, and recommended that the rules include no payment provisions until the confusion is resolved. We agree that the Act's payment mechanism is complicated. It provides for payment by agencies or, alternatively, from a no-limit continuing-appropriation fund maintained for the payment of judgments against the United States. Under section 207 of the Act, however, no payment of awards may be made from this judgment fund unless there is a specific appropriation for that purpose. To date, no such appropriation has, to our knowledge, been proposed or made. Thus, as we interpret the Act, agencies will be liable to pay awards out of their own available funds; in comments on the draft rules, the Comptroller General of the United States also reached this conclusion. The model rules reflect this interpretation.

The Treasury Department, along with USPS and the Interior Department, also said that the 60-day deadline for payment of an award is impracticable; USPS noted that some statutes, such as the Contract Disputes Act, allow 120 days for judicial review, so an applicant might seek review after receiving an award. The American Metal Stamping Association and the National Screw Machine Products Association, on the other hand, said that awards should be payable within 30 days, or immediately. As noted above, there is some question whether administrative proceedings under the Contract Disputes Act fall within the Act. In any event, we think such a longer appeal period can best be handled, where it applies, in individual agency rules. We believe the 60-day period should be generally workable; a 30-day period, on the other hand, seems inadequate, and would also present the possibility that an applicant could receive payment and then seek judicial review.

NASA expressed concern that the rules imply that agencies may determine entitlement to an award while judicial review is pending on the merits of the proceeding; it believes this is barred by 5 U.S.C. 504(c)(1). We agree that an agency should not ordinarily conduct proceedings on an application for attorney fees if judicial review of the merits has been sought. However, there may be instances in which a simple award proceeding is completed, and

then another party seeks review of the merits. The rule is intended to cover these situations.

We requested comment on whether the rules should provide for interim payments to applicants. Several commenters said that they should not, since such a program goes beyond the statutory authority and would be extremely hard to administer, and we agree. We have therefore decided not to include such a provision.

Miscellaneous Comments

In addition to the specific items covered above, we received several miscellaneous comments on the draft model rules. The Treasury Department suggested a revision to the title of the model rules to clarify that they apply only to agency proceedings, which we have made. The Gate City Savings and Loan Association of Fargo, North Dakota, believes the rules are far too long. We have made efforts to simplify them, but we believe the material to be covered in the rules is complex and requires thorough treatment.

The Heritage Federal Savings and Loan Association of Daytona Beach, Florida, wrote objecting to the Act itself. We are not in a position, of course, to act in response to this comment.

Kenneth Malmborg said the rules should state who will pay an award when agency reorganizations result in the transfer of an agency unit in which an adjudication occurs before an award is paid. We believe this circumstance will be sufficiently unusual that it can be handled on an *ad hoc* basis if it arises. Finally, the Administrative Office of the United States Courts said the rules should provide for a specific data collection form, for the purpose of the annual report to Congress. We are now considering how best to collect from agencies the data necessary for that report; we don't believe, however, that this subject should be covered by the model rules, which are intended for agencies' use in developing their own implementing regulations.

Notes on Use of the Model Rules by Agencies

Model rules are, by their nature, general. In adopting the model rules to their own use, agencies should, where possible, make them more specific, including references to particular agency units, proceedings and procedures where appropriate, and eliminating irrelevant or redundant material. The following section-by-section notes on the model rules are intended to help agencies with this task by identifying matter that may need such revision.

0.101: Here and throughout the rules, the phrase "this agency" is used to indicate the agency promulgating the rules. Each agency should substitute its own name for "this agency."

0.103: Agencies that conduct no ratemaking proceedings may wish to delete the reference to such proceedings. Similarly, agencies that conduct no licensing proceedings may eliminate the sentence concerning those proceedings. Agencies should add to this section a list of their own covered proceedings. If an agency conducts no proceedings in which other Federal agencies participate, it may delete the references here and elsewhere in the rules to awards against other agencies.

0.015: For convenience, we have used the term "agency counsel" to refer to the litigating unit of the agency against which an award is sought. When an agency has only one litigating unit that participates in its covered proceedings, it should insert the name of that unit (e.g., "the Division of Enforcement"). When an agency itself has more than one litigating unit, or when other agencies participate in an agency's covered proceedings, the agency may wish to retain the term "agency counsel" or some similar term (such as "agency party" or "agency litigating unit") and add a definition section in which it explains the term and lists the agencies and agency units that may be covered by it.

0.106: Each agency should insert in § 0.106(b), where the model rules say "[$24.09 per hour]", its own highest rate for the compensation of expert witnesses. This section also contains the first use of the statutory term "adjudicative officer." Agencies may wish to include in their rules a definition of "adjudicative officer" identifying the agency personnel who may be in that role or if the adjudicative officer will virtually always be an administrative law judge, substitute that term for "adjudicative officer."

0.107: Agencies with standard rulemaking procedures may wish to substitute a cross-reference to those procedures for the procedural material contained in this rule.

0.109: This section is necessary only if an agency delegates authority to take final agency action, in adjudications covered by the Equal Access to Justice Act, to subsidiary officers or bodies.

0.202: A cross-reference to the agency's Freedom of Information Act procedures should be included in paragraph (b) of this section.

0.204: In this section and throughout subpart C of the rules, an agency with an intermediate review board should include references to it where appropriate. An agency with no such intermediate authority should delete the reference in this provision. An agency should also revise paragraph (c) of this section as necessary to identify the particular events that might constitute "final disposition" of its proceedings.

0.301: If an agency has a standard set of rules on filing and service for all proceedings, this provision may include a cross-reference to that set of rules.

0.305: If an agency has a uniform rule describing the procedure for settlement of proceedings, a cross-reference to the rule may be included here. Otherwise, the agency may wish to include a brief summary of settlement procedures. This rule's reference to a "proposed settlement" is based on the assumption that agency litigators must ordinarily obtain approval from an administrative law judge or from the agency in order to settle a proceeding. If an agency delegates to its litigators final authority to settle proceedings, the rule should be revised to reflect that authority.

0.307: This rule describes the adjudicative officer's decision on an application as an initial decision. If an agency believes it helpful, it may wish to include here a description of or cross-reference to rules on the significance and effect of an initial decisions. In addition, an agency should replace the brackets with a specific time limit for the adjudicative officer's decision.

0.308: An agency should include here a cross-reference to its procedures for review of initial decisions. It should also replace the brackets with the number of days after which an initial decision of which review has not been taken becomes a final decision of the agency.

0.310: An agency should include here the name and address of the agency office that will handle payment of awards.

In addition, we note that agencies may be required to comply with the Regulatory Flexibility Act (5 U.S.C. 601–612) and the Paperwork Reduction Act (44 U.S.C. 3504(h)) in promulgating their own rules under the Equal Access to Justice Act. In our view, these rules fall within § 605(b) of the Regulatory Flexibility Act, permitting agencies to certify that the rule "will not * * * have a significant economic impact on a substantial number of small entities" in lieu of preparing a regulatory flexibility analysis. While the Equal Access of Justice Act itself may have such an impact, the rules merely implement the Act's provisions and do not themselves impose significant economic burdens or benefits. Accordingly, agencies may wish to consider making such a certification under 5 U.S.C. § 605(b). To

facilitate any review that may be called for under the Paperwork Reduction Act, we are sending a copy of the model rules to the Director of the Office of Management and Budget.

The text of the model rules follows.

MODEL RULES

PART 0—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN AGENCY PROCEEDINGS

Subpart A—General Provisions

Subpart B—Information Required From Applicants

Subpart C—Procedures for Considering Applications

Authority: Sec. 203(a)(1), Pub. L. 96-481, 94 Stat. 2325 [5 U.S.C. 504(c)(1)].

Subpart A—General Provisions

0.101 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504 (called "the Act" in this part), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications") before this agency. An eligible party may receive an award when it prevails over an agency, unless the agency's position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that this agency will use to make them.

0.102 When the Act applies.

The Act applies to any adversary adjudication pending before this agency at any time between October 1, 1981 and September 30, 1984. This includes proceedings begun before October 1, 1981 if final agency action has not been taken before that date, and proceedings pending on September 30, 1984, regardless of when they were initiated or when final agency action occurs.

0.103 Proceedings covered.

(a) The Act applies to adversary adjudications conducted by this agency. These are adjudications under 5 U.S.C. 554 in which the position of this or any other agency of the United States, or any component of an agency, is presented by an attorney or other representative who enters an appearance and participates in the proceeding. Any proceeding in which this agency may prescribe a lawful present or future rate is not covered by the Act. Proceedings to grant or renew licenses are also excluded, but proceedings to modify, suspend, or revoke licenses are covered if they are otherwise "adversary adjudications." For this agency, the types of proceedings generally covered include: [Here list].

(b) This agency may also designate a proceeding not listed in paragraph (a) as an adversary adjudication for purposes of the Act by so stating in an order initiating the proceeding or designating the matter for hearing. This agency's failure to designate a proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(c) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

0.104 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award. The term "party" is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart and in subpart B.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than $1 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than $5 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, or public or private organization with a net worth of not more than $5 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) An applicant who owns an unincorporated business will be considered as an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

0.105 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the

applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible prevailing applicant is on the agency counsel, which may avoid an award by showing that its position was reasonable in law and fact.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

0.106 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the fee of an attorney or agent under these rules may exceed $75.00 per hour. No award to compensate an expert witness may exceed the highest rate at which this agency pays expert witnesses, which is [$24.09 per hour]. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the adjudicative officer shall consider the following:

(1) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

0.107 Rulemaking on maximum rates for attorney fees.

(a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), this agency may adopt regulations providing that attorney fees may be awarded at a rate higher than $75 per hour in some or all of the types of proceedings covered by this part. This agency will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act.

(b) Any person may file with this agency a petition for rulemaking to increase the maximum rate for attorney fees, in accordance with [cross-reference to, or description of, standard agency procedure for rulemaking petitions.] The petition should identify the rate the petitioner believes this agency should establish and the types of proceedings in which the rate should be used. It should also explain fully the reasons why the higher rate is warranted. This agency will respond to the petition within 60 days after it is filed, by initiating a rulemaking proceeding, denying the petition, or taking other appropriate action.

0.108 Awards against other agencies.

If an applicant is entitled to an award because it prevails over another agency of the United States that participates in a proceeding before this agency and takes a position that is not substantially justified, the award or an appropriate portion of the award shall be made against that agency.

0.109 Delegations of authority.

This agency delegates to [identify appropriate agency unit or officer] authority to take final action on matters pertaining to the Equal Access to Justice Act, 5 U.S.C. 504, in actions arising under [list statutes or types of proceedings.] This agency may by order delegate authority to take final action on matters pertaining to the Equal Access to Justice Act in particular cases to other subordinate officials or bodies.

Subpart B—Information Required From Applicants

0.201 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of an agency or agencies in the proceeding that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth does not exceed $1 million (if an individual) or $5 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application shall state the amount of fees and expenses for which an award is sought.

(d) The application may also include any other matters that the applicant wishes this agency to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

0.202 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 0.104(f) of this part) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the adjudicative officer in a

sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C 552(b)(1)–(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on counsel representing the agency against which the applicant seeks an award, but need not be served on any other party to the proceeding. If the adjudicative officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with this agency's established procedures under the Freedom of Information Act [insert cross reference to agency FOIA rules].

0.203 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The adjudicative officer may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

0.204 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after this agency's final disposition of the proceeding.

(b) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(c) For purposes of this rule, final disposition means the later of (1) the date on which an initial decision or other recommended disposition of the merits of the proceeding by an adjudicative officer or intermediate review board becomes administratively final; (2) issuance of an order disposing of any petitions for reconsideration of this agency's final order in the proceeding; (3) if no petition for reconsideration is filed, the last date on which such a petition could have been filed; or (4) issuance of a final order or any other final resolution of a proceeding, such as a settlement or voluntary dismissal, which is not subject to a petition for reconsideration.

Subpart C—Procedures for Considering Applications

0.301 Filing and service of documents.

Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding, except as provided in § 0.202(b) for confidential financial information.

0.302 Answer to application.

(a) Within 30 days after service of an application, counsel representing the agency against which an award is sought may file an answer to the application. Unless agency counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(b) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the adjudicative officer upon request by agency counsel and the applicant.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of agency counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer either supporting affidavits or a request for further proceedings under § 0.306.

0.303 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 0.306.

0.304 Comments by other parties.

Any party to a proceeding other than the applicant and agency counsel may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

0.305 Settlement.

The applicant and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded, in accordance with the agency's standard settlement procedure. If a prevailing party and agency counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

0.306 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel, or on his or her own initiative, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written submissions or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible.

(b) A request that the adjudicative officer order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

0.307 Decision.

The adjudicative officer shall issue an initial decision on the application within [ ] days after completion of proceedings on the application. The decision shall include written findings and conclusions on the applicant's

eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. If the applicant has sought an award against more than one agency, the decision shall allocate responsibility for payment of any award made among the agencies, and shall explain the reasons for the allocation made.

0.308 Agency review.

Either the applicant or agency counsel may seek review of the initial decision on the fee application, or the agency may decide to review the decision on its own initiative, in accordance with [cross-reference to agency's regular review procedures.] If neither the applicant nor agency counsel seeks review and the agency does not take review on its own initiative, the initial decision on the application shall become a final decision of the agency [30] days after it is issued. Whether to review a decision is a matter within the discretion of the agency. If review is taken, the agency will issue a final decision on the application or remand the application to the adjudicative officer for further proceedings.

0.309 Judicial review.

Judicial review of final agency decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

0.310 Payment of award.

An applicant seeking payment of an award shall submit to the [comptroller or other disbursing official] of the paying agency a copy of the agency's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. [Include here address for submissions at specific agency.] The agency will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

Dated: June 18, 1981.

Reuben B. Robertson,

Chairman.

[FR Doc. 81-18632 Filed 6-24-81; 8:45 am]

BILLING CODE 6110-01-M

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Programmatic Agreement Regarding Permits for Energy Exploration and Development in the Little Missouri National Grasslands, North Dakota

AGENCY: Advisory Council on Historic Preservation.

ACTION: Notice.

SUMMARY: The Advisory Council on Historic Preservation proposes to execute a Programmatic Memorandum of Agreement pursuant to Sec. 800.8 of the regulations for the "Protection of Historic and Cultural Properties" (36 CFR Part 800) with the U.S. Department of Agriculture, Forest Service (Custer National Forest), and the North Dakota State Historic Preservation Officer concerning permits issued by the Custer National Forest for energy exploration and development in the Little Missouri National Grasslands. The agreement establishes a system that will ensure that adequate consideration is given to historic and cultural properties in planning and carrying out projects under such permits, in order to meet the requirements of Section 106 of the National Historic Preservation Act (16 U.S.C. 470).

COMMENTS DUE: July 22, 1981.

ADDRESS: Comments should be addressed to Executive Director, Advisory Council on Historic Preservation, 1522 K Street NW., Washington, D.C. 20005.

FOR FURTHER INFORMATION CONTACT: Mr. Charles Niquette, Archeologist, Western Division of Project Review, Advisory Council on Historic Preservation, 44 Union Blvd., Suite 616, Lakewood, Colorado 80228, 303-234-4946.

SUPPLEMENTARY INFORMATION: This notice of the proposed agreement invites comments from interested parties. Copies of the proposed agreement are available from the Council. The proposed agreement provides for development of a general historic preservation plan to guide decisionmaking in the issuance of permits for energy exploration and development in the Little Missouri National Grasslands. Case-by-case Council review of proposals to issue permits in conformance with the plan will be eliminated. The proposed agreement also provides interim measures for treating ridgetop lithic scatters, a common type a little-understood archeological site in the region, during the period until the plan is complete.

Dated: June 22, 1981.

Robert R. Garvey,

Executive Director.

[FR Doc. 81-18602 Filed 6-24-81; 8:45 am]

BILLING CODE 4310-10-M

DEPARTMENT OF AGRICULTURE

Forest Service

Forest Land and Resource Management Plan, Winema National Forest, Klamath County, Oreg.; Intent To Prepare an Environmental Impact Statement

Pursuant to the National Environmental Policy Act of 1969, the Forest Service, Department of Agriculture, will prepare an environmental impact statement for the Winema National Forest Land and Resource Management Plan.

The proposed action is to prepare and implement an integrated management plan for the lands and resources of the Winema National Forest.

The Forest Land and Resource Management Plan will be prepared pursuant to the National Forest Management Act of 1976 and its implementing regulations (36 CFR Part 219). A range of management alternatives will be considered and described in draft and final environmental impact statements. The alternatives will reflect combinations of resource management practices designed to meet management objectives for the various multiple uses, including outdoor recreation, wilderness, wildlife and fish, range, timber, and water. Alternatives will be formulated according to the following guidelines: (1) each alternative will be capable of being achieved; (2) each alternative will provide for the orderly elimination of backlogs of needed treatments for the restoration of renewable resources as necessary to achieve the multiple-use objectives of the alternative; (3) each identified major public issue and management concern will be addressed in one or more alternatives; and (4) each alternative will represent the most cost efficient combination of management practices examined that can meet the objectives established in the alternaive. In addition, a no-action alternative will be formulated as the most likely condition expected to exist in the future if current management direction were to continue unchanged.

Federal, state, and local governments, Indian tribes, and the general public will be invited to participate in the scoping process which includes: (1)

identification of issues to be addressed in the Forest Land and Resource Management Plan; (2) identification of issues to be analyzed in depth; and (3) elimination of insignificant issues. Preliminary issues, concerns, and opportunities will be identified from previous public input to RARE II, unit plans and other activities. This information will be presented to the public for review and comment beginning in August 1981. Specific dates, times, and locations will be announced through local media and direct mailings.

R. E. Worthington, Regional Forester, Pacific Northwest Region, is the responsible official.

The draft environmental impact statement is expected to be available for public review by December 1982. The final environmental impact statement is scheduled for completion in June 1983.

Questions or comments on the proposed action and environmental impact statement should be addressed to Arthur W. DuFault, Forest Supervisor, or Lenard L. Morin, Forest Planner, Winema National Forest, P.O. Box 1390, Klamath Falls, Oregon 97601.

Dated: June 16, 1981.

Paul E. Buffam,

Acting Regional Forester.

[FR Doc. 81-18721 Filed 6-24-81; 8:45 am]

BILLING CODE 3410-11-M

Forest Service, Southwestern Region, South Kaibab Grazing Advisory Board; Meeting

June 18, 1981.

The South Kaibab Grazing Advisory Board will meet at 9:00 A.M., Friday, August 7, 1981, at the Ramada Inn Conference Room, Williams, Arizona.

The purpose of this meeting is:

1. Allotment Management Planning—

(a) Water Rights

(b) Wildlife Population, Trends, and Objectives

(c) Reforestation Objectives and Site Selection Criteria

(d) Range Condition and Trend Studies

2. Utilization of Range Betterment Funds—

The meeting will be open to the public. Persons who wish to attend should notify:

Forest Supervisor
Kaibab National Forest
800 South 6th Street
Williams, Arizona 86046
Telephone: (602) 635-2681

Those attending may express their views when recognized by the chairman.

Leonard A. Lindquist,

Forest Supervisor.

[FR Doc. 81-18786 Filed 6-24-81; 8:45 am]

BILLING CODE 3410-11-M

Soil Conservation Service

Blacktail Recreation Road PWB Recreation RC&D Measure, Idaho; Finding of No Significant Impact

AGENCY: Soil Conservation Service, Department of Agriculture.

ACTION: Notice of Finding of No Significant Impact.

FOR FURTHER INFORMATION CONTACT: Amos I. Garrison, Jr., State Conservationist, Soil Conservation Service, Room 345, 304 North Eighth Street, Boise, Idaho 83702, telephone (208) 334-1601.

Notice: Pursuant to Section 102(2)(c) of the National Environmental Policy Act of 1969; the Council on Environmental Quality Guidelines (40 CFR Part 1500); and Soil Conservation Service Guidelines (7 CFR Part 650); the Soil Conservation Service, U.S. Department of Agriculture, gives notice that an environmental impact statement is not being prepared for the Blacktail Recreation Road PWB RC&D Measure, Bonneville County, Idaho.

The environmental assessment of this federally assisted action indicates that the project will not cause significant local, regional, or national impacts on the environment. As a result of these findings, Amos I. Garrison, Jr., State Conservationist, has determined that the preparation and review of an environmental impact statement are not needed for this project.

Blacktail Recreation Road measure concerns a plan for providing adequate access to an existing water based recreation facility. The planned works of improvement consists of preparing suitable subbase and paving about 6 miles of an existing gravel road. Conservation practices will be to grade and seed the borrow areas to control existing erosion and provide improved aesthetics.

The Notice of Finding of No Significant Impact (FNSI) has been forwarded to the Environmental Protection Agency. The basic data developed during the environmental assessment are on file and may be reviewed by contacting Mr. Amos I. Garrison, Jr. The FNSI has been sent to various Federal, State, and local agencies and interested parties. A limited number of copies of the FNSI are available to fill single copy requests at the above address.

Implementation of the proposal will not be initiated until July 27, 1981.

(Catalog of Federal Domestic Assistance Program No. 10.901, Resource Conservation and Development Program. Office of Management and Budget Circular A-95 regarding State and local clearinghouse review of Federal and federally assisted programs and projects is applicable)

Dated: June 15, 1981.

Joseph W. Haas,

Deputy Chief for Natural Resource Projects.

[FR Doc. 81-18812 Filed 6-24-81; 8:45 am]

BILLING CODE 3410-16-M

Cheboygan City-County Airport Critical Area Treatment and Land Drainage RC&D Measure, Mich.; Finding of No Significant Impact

AGENCY: Soil Conservation Service, Department of Agriculture.

ACTION: Notice of a finding of no significant impact.

FOR FURTHER INFORMATION CONTACT: Mr. Homer R. Hilner, State Conservationist, Soil Conservation Service, 1405 South Harrison Road, East Lansing, Michigan 48823, telephone 517-337-6702.

Notice: Pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969; the Council on Environmental Quality Guidelines (40 CFR Part 1500); and the Soil Conservation Service Guidelines (7 CFR Part 650); the Soil Conservation Service, U.S. Department of Agriculture, given notice that an environmental impact statement is not being prepared for the Cheboygan City-County Airport Critical Area Treatment and Land Drainage RC&D Measure, Cheboygan County, Michigan.

The environmental assessment of this federally assisted action indicates that the project will not cause significant local, regional, or national impacts on the environment. As a result of these findings, Mr. Homer R. Hilner, State Conservationist, has determined that the preparation and review of an environmental impact statement are not needed for this project.

The measure concerns a plan for the installation of practices for critical area treatment and land drainage. Critical area treatment will include 6 grade stabilization structures, 5 sod chutes, approximately 1,100 cubic yards of excavation, and approximately 3.4 acres of critical area seeding. Land drainage will include outlet channel improvement, drainage channel improvements, and approximately